

BEFORE THE
OFFICE OF ADMINISTRATIVE HEARINGS
STATE OF CALIFORNIA

In the Matter of:

PARENT ON BEHALF OF STUDENT,

v.

SAN JOSE UNIFIED SCHOOL DISTRICT.

OAH Case No. 2015100633

ORDER GRANTING MOTION TO
UNEXPEDITE HEARING

On October 19, 2015, Student filed a Due Process Hearing Request (complaint) against San Jose Unified School District. On October 20, 2015, the Office of Administrative Hearings issued a Scheduling Order and Notice of Expedited and Unexpedited Due Process Hearing and Mediation (Scheduling Order). The Scheduling Order set this matter for Expedited Mediation on November 3, 2015, Expedited Prehearing Conference on November 9, 2015, and Expedited Due Process Hearing on November 17, 18, and 19, 2015.

On October 28, 2015, District filed a motion to unexpedite this matter and vacate the expedited dates. On October 28, 2015, Student filed a Notice on Non-opposition to District's motion.

APPLICABLE LAW

A parent of a child with a disability who disagrees with any decision by a school district regarding a change in educational placement of the child based upon a violation of a code of student conduct, or who disagrees with a manifestation determination made by the district, may request and is entitled to receive an expedited due process hearing. (20 U.S.C. § 1415(k)(3)(A); 34 C.F.R. § 300.532(a) (2006).¹) An expedited due process hearing before OAH must occur within 20 school days of the date the complaint requesting the hearing is filed. (20 U.S.C. § 1415(k)(4)(B); 34 C.F.R. § 300.532(c)(2).) The procedural right to an expedited due process hearing is mandatory and does not authorize OAH to make exceptions or grant continuances of expedited matters. (*Ibid.*) In sum, a matter can only be unexpedited or continued if no issue is alleged that is subject to an expedited hearing, or if the student withdraws the issues in the complaint that triggered the expedited hearing.

¹ All references in this order to Title 34, Code of Federal Regulations are to the 2006 edition.

Under federal and state special education law, students found eligible for special education are afforded certain rights in disciplinary matters. Among those rights is the right to a determination of whether the student's misconduct "that led to a disciplinary change of placement" was caused by or directly related to a child's disability. (20 U.S.C. § 1415 (k)(1)(E)(I)(II); 34 C.F.R. § 300.530; Ed. Code, § 48915.5, subd. (a) and (b).) These protections extend to students not previously identified as eligible for special education services only if the following factors are met: (1) the student has engaged in behavior that violated any rule or code of conduct of the school district and, (2) the school district had knowledge, or is deemed to have had knowledge, that the student was a child with a disability "before the behavior that precipitated the disciplinary action occurred." (20 U.S.C. § 1415 (k)(5)(A).)

The "basis of knowledge" or "deemed" knowledge exists when one or more of the following has occurred: (1) the parent of the child expressed concern in writing to supervisory or administrative personnel of the appropriate educational agency, or a teacher of the child, that the child is in need of special education and related services; (2) the parent of the child has requested an evaluation of the child; or (3) the teacher of the child, or other personnel of the local educational agency, expressed specific concerns about a pattern of behavior demonstrated by the child directly to the director of special education of the agency or to other supervisory personnel of the agency. (20 U.S.C. § 1415 (k)(5)(B); 34 C.F.R. § 300.534(b).)

However, an exception to the basis of knowledge exists when a parent refuses to permit the local educational agency to assess the child, parent has refused services, or local education agency has assessed the student and found the student not eligible for special education services. (20 U.S.C. § 1415 (k)(5)(C); 34 C.F.R. § 300.534(c).) If the local education agency does not have a basis of knowledge, it may take the same disciplinary measures against a student that it could take against any child who does not have a disability who engage in comparable behavior. (20 U.S.C. § 1415 (k)(5)(D); 34 C.F.R. § 300.534(d).)

DISCUSSION

In this matter, Student alleges as the expedited issue for hearing that District disciplined him by changing school placement for disciplinary reasons. However, the complaint alleges, and Student did not dispute in his non-opposition, that the change of placement occurred after District assessed and found Student not eligible for special education services. Further, Student does not contend that the change of schools was not comparable to non-disabled students who engage in similar behaviors. Therefore, District established that no expedited issue for hearing exists. Accordingly, the expedited hearing dates will be vacated.

ORDER

1. The motion to unexpedite this matter is granted.
2. The following expedited dates are vacated: Expedited Mediation on November 3, 2015, Expedited Prehearing Conference on November 9, 2015, and Expedited Due Process Hearing on November 17, 18, and 19, 2015.
3. This matter shall proceed on the non-expedited dates currently scheduled as follows:

Mediation:	November 24, 2015 at 9:30 a.m.
Prehearing Conference:	December 4, 2015 at 10:00 a.m.
Due Process Hearing:	December 10, 2015, continuing day to day thereafter, Monday through Thursday, unless otherwise ordered.

DATE: October 30, 2015

/s/
JUDITH PASEWARK
Administrative Law Judge
Office of Administrative Hearings